

ARBITRATION AWARD SUMMARY

OCB Award Number: 303

OCB Grievance Number: 15-03-880526 -0093-04-01

Union: FOP Robert E. Senkar

Department: OSH P

Arbitrator: Donald Leach

Management Advocate: Lt. Darryl Anderson

Union Advocate: Paul Cox

Arbitration Date: 5-10-89

Decision Date: 7-20-89

Decision: Denied

A R B I T R A T I O N
O P I N I O N A N D A W A R D

STATE OF OHIO
DEPARTMENT OF HIGHWAY SAFETY
STATE HIGHWAY PATROL

OCB Grievance No. 15-03-880526-093-04-01

and

July 20, 1989

FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC.

ARBITRATOR: DONALD B. LEACH, appointed through the procedures of
the Department of Administrative Services, Office of
Collective Bargaining, and the Fraternal Order of
Police, Ohio Labor Council, Inc.

APPEARANCES: FOR THE STATE OF OHIO:
Lieutenant Darryl L. Anderson, Personnel-Labor Relations
Ohio State Highway Patrol, 660 East Main Street,
Columbus, Ohio 43266-0562

FOR THE OHIO LABOR COUNCIL, INC.:
Paul L. Cox, Esq., Chief Counsel, Ohio Labor Council,
Inc., 3360 East Livingston Avenue, Columbus, Ohio 43227

I S S U E
(As stipulated)

"In accordance with 19.01 of the Contract, was the
Employer correct in suspending the Grievant for five (5) working days as
the result of his actions on May 26, 1988? If not, what shall the
remedy be?"

B A C K G R O U N D

Grievant, Robert E. Senkar, was suspended for five working days for having wounded a suspect, on May 26, 1988, by discharge of his sidearm, while in the process of making an arrest.

The basic facts are that Grievant and other officers, from the city of Brunswick, from the city of Medina, and a deputy sheriff, pursued and stopped two suspects who were fleeing in an automobile at very high speeds. In arresting the driver, Grievant approached the vehicle with gun drawn, while other officers surrounded it; opened the driver's door; grasped the suspect's arm to pull him out, at which point the suspect bolted and ran into Grievant; the two wrestled on the ground briefly; Grievant's gun discharged and the suspect received a non-fatal bullet wound on the back of the neck, which entered, went under the skin for a few inches, and exited behind the ear.

After investigation, the Director of Highway Safety notified Grievant, on July 18, 1988, that he proposed a suspension for five days for violation of Rule 4501:2-6-02(V)(3) of the Rules and Regulations of the Highway Patrol because:

"on Thursday, May 26, 1988, approximately 1:13 a.m., you failed to exercise care in handling and using firearms so as to avoid endangering other persons in that while you were attempting to take a subject into custody; you accidentally discharged your service revolver, resulting in the subject being struck in the neck by the bullet."

Major R. K. Hartsell held the pre-disciplinary conference and afterward, on July 27, 1988, concluded as follows:

"After review of the investigative facts, evidence and witnesses' testimony, this officer agrees with the recommended suspension based upon the following.

The information does establish that Trooper Senkar approached a vehicle with his weapon drawn and in his right hand, and attempted to remove the driver from the vehicle by placing his left hand on the driver's clothing. During the removal process, his right hand, gripping the service revolver, made contact with the back of the suspect's jacket and the weapon discharged. The bullet penetrated the suspect's neck."

Grievance was filed on August 26, 1988, as follows:

"I was suspended without pay for five (5) days without just cause in violation of Article 19.01. That the five day suspension given be reversed and my records expunged."

The finding at the Level III hearing, dated September 12, 1988, was:

"After reviewing the information supplied at the Step 3 hearing by both parties, the Hearing Officer finds no violation of the contract."

As pointed out in the management contention, the several points required to show "just cause" have been met.

The facts presented by the management representative at the Step 3 hearing clearly indicate, beyond any doubt, the grievant did in fact violate the rule indicated in the disciplinary action.

The Union's single point of contention - that the gunshot was not "accidental" but instead was caused by the actions of the suspect - does not absolve the grievant from exercising proper care and handling of his weapon, which would have prevented the discharge from occurring.

The grievance is denied."

The testimony at the arbitration hearing was given by a number of witnesses, some from the Patrol, some from the local police forces and Grievant. Some of the evidence also related to other shootings by Patrol Troopers. Much of the factual evidence was undisputed.

The two suspects admitted later that they had been stealing stereos. They were sighted by police in Brunswick, fled in an automobile and were pursued as described above. In the pursuit, Grievant first attempted to block the road but was unsuccessful. (Later, as the result of the cooperation of all, the suspect's car was brought to a halt.)

There had been no reports that the suspect or his passenger were armed, although later a knife and a sheath were found in their auto.

Grievant's superior officer, Lieutenant Harvey J. Callahan, investigated and found that Grievant had opened the driver's door to bring the suspect out while he had his gun in his right hand. The

officer concluded that Grievant was not supposed to open the car door while his gun was out - that, indeed, he should simply have ordered the driver to get out.

William Shuster, of the Brunswick police, testified in general accord with the details. After the suspect's car was stopped, he saw other officers remove the passenger in the suspect's car from the right side. He then took a position as cover on the left of it. At that time, also, he saw Grievant move to the left side of the suspect's car and edge toward the driver's door. He heard Grievant yell to the suspect to get out, but the latter failed to move. Then he saw Grievant open the driver's door, at which time the suspect ran out and ran into Grievant. They both fell to the ground and wrestled until the gun went off. He added that Grievant was surprised at the suspect's action. In his opinion, Grievant had no time after the suspect left the car to holster his gun.

Lieutenant Robert F. Welsh was qualified as an expert and testified about the judgment displayed in this matter. He has studied broadly in weapon retention, has taught it and written articles and books about the subject. In connection with this case, he said he had read all of the reports made on the incident including that of Grievant.

In his view, Grievant should have holstered his gun immediately when he left his cruiser to take charge of the suspect because other officers were there with their guns drawn. He may have approached the suspect's car reasonably, however, even with his gun drawn, but he should certainly have holstered it when he saw no weapon in sight in the suspect's car. There was a further violation of standards, he said, when Grievant took the suspect from the car. In those circumstances, where an officer has a gun in hand, he does not hold anything else, such as handcuffs, flashlight, etc. That includes having a hand on a suspect. Indeed, he thought it to be unwise to have a weapon out while in close proximity to a suspect when back-up officers were present.

Later on in the hearing, Lieutenant Welsh was recalled. In part, he testified on other cases he had reviewed for the Patrol. He differentiated the others from this one in that, there, the suspect's car was not blocked, as it was here. Here, also, back-up was present and not in the others. In this case, he said, Grievant's principle error lay in keeping his gun out after he saw the suspect's hands. If he couldn't see the suspect's hands, it should have been holstered when he got a hand on the suspect. He also said that, if there were a struggle, holstering may have been prevented. He added that, here, control of the suspect was effected when the Grievant had opened the suspect's car door. Certainly, no force was necessary when the door opened and suspect was seen to have no weapon. In conclusion, he said

the totality of the circumstances showed a violation to have occurred primarily because an officer cannot use deadly force unless put in fear of his life, or the life of another is threatened. That was not the situation here, he said.

Grievant testified that he had yelled for the suspect to put his hands up which the suspect had done. The suspect dropped his arms later on but raised them again when Grievant ordered him again to do so. He then had opened the car door and had ordered the suspect out. As the suspect turned, he also bolted from the car, and knocked Grievant down, but Grievant kept holding on to the suspect. He said he didn't have enough time to holster his gun. At that time, he said, he couldn't tell whether or not there was a weapon present other than his own. In the ensuing struggle, he said, he had his gun on the suspect's back but pointing up and away.. At some point in the process, his gun had gone off. When the suspect was on the ground, he said, Grievant had holstered his gun, that being the first time he had had the opportunity to do so after he had let go of the door. He said that he had never gotten control of the suspect until the latter was on the ground. He added that he could see the suspect's hands when he got to the side of the suspect's car, and had seen no weapon. On the other hand, he said, he couldn't see the suspect's hands when he opened the driver's door.

Grievant added that he had taken his time when he got to the rear of the door of the suspect's car and in opening the door. Once the car door was opened, things went quickly, he said. As to his feelings, he said he feared for his life but then, he added, he always does. Finally, he said that, if the suspect had escaped, he would not have shot at him.

Other details appear hereafter where appropriate.

C O N T R A C T P R O V I S I O N S

ARTICLE 19 - DISCIPLINARY PROCEDURE

§19.01 Standard

No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause.

RULES AND REGULATIONS

4501:2-6-02 Performance of Duty and Conduct

(V) Use of force

(3) A member, while on duty, shall exercise care in handling, carrying, transporting, and using firearms so as to avoid endangering other persons.

CONTENTIONS OF THE PARTIES

STATE'S POSITION

Just cause existed for the discipline in this case.

Discharge of Grievant's gun constitutes endangerment in light of the suspect's presence and that of a number of officers around.

The Council focused on the exact second the Rule Violation occurred. The Grievant and the other officers in the Patrol, however, have been and continue to be trained in the use of force, in various sets of circumstances, including combinations of facts, as well as isolated ones. The use of weapons is restricted by the Rules to:

(V) Use of Force

(1) A member shall be justified in using deadly force under the following circumstances:

(a) To defend himself/herself from serious injury or death.

(b) To defend another person from serious injury or death.

At the hearing, Grievant admitted that he was no more or less concerned about serious injury or death to himself than in most other situations arising in connection with the discharge of his duties. Moreover, he admitted that he had a view of the suspect and saw no weapon.

The entire situation must be evaluated in light of the fact that the police on the scene clearly had a preponderance of force and fire power.

Grievant further said that he wouldn't have used his gun even if the suspect struggled or escaped. What was his purpose, then, with all the back-up there, in having his gun drawn?

The other cases of shooting brought out by the Council where no discipline came into play are substantially different from this one. The Patrolmen were alone in those cases. Grievant, however, had ample back-up. They followed procedures in their circumstances, he did not. The others had unexpected physical contact while here Grievant initiated the violent confrontation. He could have done his duty by a simple order to the suspect to step out of the car.

COUNCIL'S POSITION

To prevail, the Patrol must show that Grievant violated a rule that required him to do something in a manner different from the manner in which he actually acted. No evidence exists that any such rule was violated.

The incident here took place in a matter of seconds, a period that allowed no time for a systematic, considered approach. Grievant did not know whether or not the suspect was armed and that required him to be prepared to protect himself and the others at the scene. Here, the officers and Grievant told the suspect to leave the car, orders that the suspect could hear in light of the fact that he heard and obeyed other orders to raise his hands.

Law officers are within their rights when they do not use more force than is reasonably necessary.

The suspect's injury resulted from his action in bolting from the car. The injury resulted from that unexpected action, not from the Grievant.

The chief witnesses for the Patrol agreed that Grievant's approach to the suspect's car with gun drawn was appropriate. In fact, Lieutenant Welsh said that Grievant should have holstered his gun when he saw that the suspect had no weapon. He then admitted that the immediately ensuing struggle could have prevented him from doing so.

Lieutenant Welsh was unable logically to differentiate other shootings by Troopers from this and, in those cases, no discipline was imposed.

Actually, Grievant never had control of the suspect until after the shooting. It was the factor of "control", however, on which the Patrol's actions were premised.

D I S C U S S I O N

There is no doubt but that there was a great deal of tension on the part of all those at the scene after the suspect and his passenger were stopped. The officers had been engaged in a high speed chase for several miles at the risk of their lives. The suspects had been stopped but were not yet under formal arrest. The suspects, also, were in their car and it was unclear as to whether or not they had weapons. The police personnel, Grievant, police from Brunswick and

Medina and a deputy sheriff, all had gathered around with guns drawn. Grievant then approached the suspects' car and reached the driver's door, after the passenger had been removed. All those factors led to and aggravated the nervous tension each one felt.

When the remaining suspect emerged from the car, he did so in a rush, colliding with Grievant and causing the two to fall to the ground where they struggled for a while before Grievant's gun was discharged and the suspect subsided.

It seems generally agreed that Grievant was justified in keeping his gun out up to the time he reached a position just behind the suspect's door. The facts also establish that, from the time the suspect emerged from the car and until the gun discharged, events moved so rapidly that Grievant could not reasonably have been expected to holster his gun.

It follows that the critical questions concerning Grievant's conduct arise between his reaching position behind the suspect's door and the suspect's emergence from the car.

No one was positive that the suspect didn't have a weapon but Grievant did testify that he saw the suspect's hands from the side of or behind the car as he moved forward and while the suspect's hands were raised. At that time he saw no weapon in the suspect's possession. It must also be borne in mind that, throughout the preceding chase, no report had been made of the suspects' having or using any weapon, although they had risked their lives and the lives of others, including Grievant.

That created a reasonable inference that, being reckless, they would have risked gun shots if they had had a gun. Moreover, if there were a weapon, why wouldn't it have been used or appeared when the passenger was removed? The odds, then, were really on the side of no weapon in the car.

While the Grievant was still beside the suspect's car, he said he had time to consider his actions. He pursued the course he had followed in going to the suspect's car by continuing and then opening the driver's door beside the suspect. Thus, he didn't rethink his proposed course of action at that point even though he had time to do so.

At the time he acted, his gun was still drawn. That raises several questions.

If the suspect had had a weapon, it would seem that he would have been more controllable at a distance than at close quarters in that the horizontal angle of fire at a distance would be more restricted than with fast motion at closer quarters. Why then go to the car door with gun drawn? Likewise, one with a weapon could emerge unexpectedly from the suspect's car and could fire almost as fast as Grievant could with a gun in his hand, i. e., both would have had guns out and the Grievant would have been surprised, whereas the suspect would not. Both shots would have tended to be somewhat wild under those circumstances, of course, and Grievant could have been injured, notwithstanding his having his own weapon in hand. A similar question arises in the context of the suspect's attempt to escape as the officers on the scene, who testified, all felt he was trying to do. That was not an unreasonable possibility to be considered in advance. Thus, if the suspect started to run, the Grievant would have been at a disadvantage. He could not lawfully shoot at a fugitive, and as he himself testified, he wouldn't have done so. At the same time, having a gun in one hand, he would have been at a disadvantage in attempting to restrain the suspect by physical force.

It follows that nothing was served at close quarters by having a gun in hand when he had back-up. At the same time, his gun would have interfered with his other possible responses to the various actions the suspect might have taken.

No explanation for these factors was undertaken. The only justification for holding the gun then was that he feared for what the suspect might do, and that, as shown, wouldn't have assured his protection from one shot at least. (It might have protected him from more than one, as would be true if Grievant had been by himself but, here, he had back-up which could easily have brought the suspect down if he had shot a gun or used another type of weapon such as a knife.)

Lieutenant Welsh stressed that his view rested on the totality of the evidence as he had gathered it from the reports of those at the scene. The failure of the experts to pinpoint the time when Grievant departed from good judgment really cannot be faulted. In a moving scene such as was involved here, it is obvious that one action leads to a series of others. At some time, the correctness or incorrectness of judgment is revealed. That judgment, however, rests on preceding actions and it becomes impossible, logically, to determine precisely the moment or act that was manifestly improper.

It follows that there is no sufficient reason to question the Patrol's judgment here. Certainly, the safety of the other officers was jeopardized, as well as the life of the suspect, while Grievant was taking the actions in question.

The Council made much of other shooting incidents in which the Troopers there involved were not disciplined. In those cases, the

Troopers had no back-up and had to take other protective steps than Grievant was required to do, in light of his back-up.

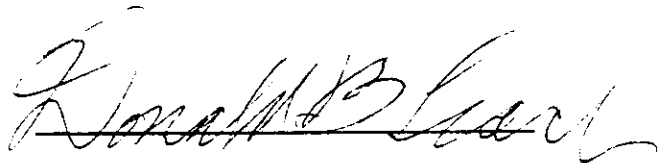
Certainly, the arbitrator sympathizes with the Grievant, who was acting under great stress where judgment can become foggy. The courts, however, have imposed what may reasonably be considered to be highly technical standards on the police. Those standards cannot be ignored by the Patrol. Under those standards, the Grievant's gun in hand was not reasonably necessary for the protection of others or of himself.

It is not the violation of a detailed rule that is in question here but rather Grievant's judgment. Although he was trained thoroughly in these matters, his judgment turned out to be faulty. Bad judgment can be penalized where, as here, the lives of others were placed in jeopardy.

It must be concluded, therefore, that the Grievance must be denied, in that the discipline imposed on Grievant was for just cause.

A W A R D

1. Grievance, dated August 26, 1988, of Trooper Robert E. Senkar, is hereby denied.

A handwritten signature in dark ink, appearing to read "Donald B. Leach", written in a cursive style.

Donald B. Leach